STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELIZABETH KISZELY,	)	
	)	
Charging Party,	)	Case No. LA-CE-3837
	)	
v.	)	PERB Decision No. 1268
	)	
NORTH ORANGE COUNTY COMMUNITY COLLEGE DISTRICT,	)	June 18, 1998
	)	
Respondent.	)	

Appearances: Elizabeth Kiszely, on her own behalf; Parker, Covert & Chidester by Margaret A. Chidester, Attorney, for North Orange County Community College District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION AND ORDER

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Elizabeth Kiszely (Kiszely) of a Board agent's dismissal (attached) of her unfair practice charge. In the charge, Kiszely alleged that the North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA) section 3543.5(a) and (b)[1] by retaliating against her for her participation in

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an

protected activities.

The Board has reviewed the entire record in this case, including Kiszely's original and amended unfair practice charge, the Board agent's warning and dismissal letters, Kiszely's appeal and the District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. LA-CE-3837 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

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applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

February 27, 1998

John R. Marshall
Law Office of Robert D. Coveillo
3 Imperial Promenade, Suite 42 0
Santa Ana, CA 92707

Re: Elizabeth Kiszely v. North Orange County Community College District
Unfair Practice Charge No. LA-CE-3837, First Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Mr. Marshall:

Elizabeth Kiszely alleges the North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA) § 3543.5 (a) and (b) by retaliating against her for her participation in protected activities.

I indicated to you, in my attached letter dated February 6, 1998, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 18, 199 8, the charge would be dismissed. I later extended that deadline to February 20, 1998, and then to February 21, 1998. On February 21, 1998, Kiszely filed an amended charge by certified mail.

The original charge included several allegations which I listed in the warning letter as (a) - (h). Those allegations are that the District: (a) threatened reprisals against Kiszely in August; (b) accused Kiszely of unprofessional conduct in August and September 1995; (c) threatened Kiszely during a Department meeting on September 26, 1995; (d) "propound[ed] to third parties a derogatory, defamatory correspondence" in December 1995; (e) accused Kiszely of having behavioral problems in January 1996; (f) conspired to obtain negative and derogatory statements about Kiszely in February 1996; (g) disseminated false statements in March 1996; and (h) issued a notice of unprofessional conduct against Kiszely in June 1996.

My February 6, 1998, Warning Letter indicated the above-referenced charge should be dismissed for the following reasons: (1) allegations (a) - (e) were untimely; (2) allegations (f), (g), and (h) were untimely because they were not tolled by the Charging Party's grievance; (3) allegations (f), (g), and (h)

were untimely even if they were tolled; and (4) the charge failed to factually demonstrate a prima facie discrimination violation. The amended charge included approximately one hundred pages and alleged the charge was timely filed and factually demonstrated a prima facie violation.

The amended charge failed to state a prima facie violation of the EERA within the jurisdiction of PERB for the reasons that follow.

As stated in the warning letter, EERA § 3541.5(a)(1) provides the Public Employment Relations Board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. The amended charge does not provide facts indicating the charge was timely filed. Kiszely filed the original Unfair Practice Charge LA-CE-3837 on September 2, 1997. Therefore unfair practices occurring before March 2, 1997, are untimely and outside the jurisdiction of PERB. All of the charge's allegations occurred prior to March 2, 1997, and would be considered untimely absent tolling.

The charge does not provide any facts indicating Kiszely filed a grievance regarding allegations (a) - (e). Thus, the statute of limitations regarding those allegations was not tolled, and they must be dismissed as untimely.

As the original and amended charges allege a grievance was filed regarding allegations (f) - (h), these allegations are addressed separately from allegations (a) - (e). Allegations (f) - (h) occurred in January 1996, March 1996, and July 3, 1996, respectively. These allegations were originally the subject of unfair practice charge LA-CE-3699, but were dismissed and deferred to arbitration on January 24, 1997. Kiszely reiterated these allegations in LA-CE-3837, filed on September 2, 1997, and argued the grievance she filed on October 8, 1996, tolled the statute of limitations period. The February 6, 1998, Warning Letter stated that the October 8, 1996, grievance did not toll the statute of limitations period because the grievance did not allege the District's conduct violated Article 4.4.2, which is the contract's nondiscrimination clause citing the EERA.[1]

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[1]Section 4.4.2 of the CBA states:

> No Unit Member shall be in any way discriminated against, intimidated, restrained or coerced because of affiliation with or participation in the Association, or the exercise of rights guaranteed by Chapter 10.7, sections 3540-3549 of the Government

The warning letter noted, Kiszely's grievance did not allege a violation of Article 4.4.2 and therefore failed to put the District on notice that Kiszely was alleging the District retaliated against her for her participation in activities protected by the EERA. In the amended charge, Kiszely argues:

> The District was indeed notified of all of the alleged violations. The October 8, 1996, formal grievance puts the District on notice the grievance includes "any other practice, procedures, policies, and articles that may apply." Article 4.4.2 applies, as does all of Article 4.4.

However the facts of this charge indicate, and the warning letter noted, the grievance did not include any reference to Article 4.4.2. The inclusion of the "other practices" language does not remedy this problem. Since the grievance did not refer to Article 4.4.2, it would be unlikely that the District was on notice that Kiszely intended to allege a violation of that article. The facts of this charge do not indicate the grievance was ambiguous. The grievance made specific reference to seven other articles of the CBA, without making any reference to Article 4.4.2. The omission of this article, when coupled with the inclusion of seven other specific articles further indicates the District was not put on notice that the grievance concerned District discrimination based on activity protected by the EERA.

Moreover, the grievance cited Article 4.4.1, but omitted the contract's next article, Article 4.4.2. This suggests that Kiszely was aware of Article 4.4.2, and decided not to allege a violation of that article. The facts fail to demonstrate the District was on notice that the grievance included an allegation that the District violated Article 4.4.2. Thus, the October 8, 1996, grievance did not toll the statute of limitations period, and the charge must be dismissed as untimely and outside the jurisdiction of PERB.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies

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Code.

of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code of Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By
Tammy L.Samsel
Regional Director

Attachment

cc: Margaret Chidester

PUBLIC EMPLOYMENT RELATIONS BOARD

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(213) 736-3127

February 6, 1998

John R. Marshall
Law Office of Robert D. Coveillo
3 Imperial Promenade, Suite 420
Santa Ana, CA 92707

Re: Elizabeth Kiszely v. North Orange County Community College District
Unfair Practice Charge No. LA-CE-3837
Warning Letter

Dear Mr. Marshall:

Elizabeth Kiszely alleges the North Orange County Community College District (District) violated the Educational Employment Relations Act (EERA) § 3543.5 (a) and (b) by retaliating against her for her participation in protected activities.

My investigation revealed the following information. On July 30, 1996, Kiszely filed unfair practice charge LA-CE-3699 alleging the District retaliated against her for her participation in protected activities. On November 21, 1996, I issued a warning letter regarding the allegations in unfair practice charge LA-CE-3699. On January 24, 1997, I dismissed and deferred to arbitration the following allegations of adverse action by the District: letters of complaint by department members and the College President in January and March 1996, and a July 3, 1996 notice of unprofessional conduct.[1] A complaint issued on other allegations in the charge, and were settled and withdrawn on June 10, 1997.

On September 2, 1997, Kiszely filed unfair practice charge LA-CE-3837. The charge indicates "agents" of the District: (a) threatened reprisals against Kiszely in August; (b) accused Kiszely of unprofessional conduct in August and September 1995;

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[1]Section 4.4.2, of the collective bargaining agreement states:

> No Unit Member shall be in any way discriminated against, intimidated, restrained or coerced because of affiliation with or participation in the Association, or the exercise of rights guaranteed by Chapter 10.7, sections 3540-3549 of the Government Code.

(c) threatened Kiszely during a Department meeting on September 26, 1995; (d) "propound[ed] to third parties a derogatory, defamatory correspondence" in December 1995; (e) accused Kiszely of having behavioral problems in January 1996; (f) conspired to obtain negative and derogatory statements about Kiszely in February 1996; (g) disseminated false statements in March 1996; and (h) issued a notice of unprofessional conduct against Kiszely in June 1996. Allegations (f), (g), and (h) reiterate the allegations I dismissed and deferred to arbitration in Unfair Practice Charge LA-CE-3699.

The above-stated allegations do not state a prima facie violation within the jurisdiction of PERB for the reasons that follow.

As an initial matter, the Board's jurisdiction is limited by a six month statute of limitations period. EERA § 3541.5(a)(1) provides the Public Employment Relations Board shall not, "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." It is your burden, as the charging party to demonstrate the charge has been timely filed. (See Tehachapi Unified School District (1993) PERB Decision No. 1024.)

Kiszely filed Unfair Practice Charge LA-CE-3837 on September 2, 1997. Therefore unfair practices occurring before March 2, 1997, are untimely and outside the jurisdiction of PERB. Allegations (a) through (e) occurred prior to March 2, 1997, and are therefore untimely. As no grievance was filed regarding these allegations, tolling is not appropriate. Thus, allegations (a) through (e) are outside the jurisdiction of PERB and must be dismissed.

Under the above-stated statute of limitations analysis allegations (f), (g) and (h) would also be untimely because they also occurred prior to March 2, 1997. However, under EERA § 3541.5(a)(2) the statute of limitations period may be tolled during the time it took the charging party to exhaust the grievance machinery. Allegations (f), (g), and (h) occurred in January 1996, March 1996, and July 3, 1996, respectively. Thus, the six month statute of limitations period began to run on those dates. The charge indicates Kiszely filed a grievance on October 8, 1996 and that therefore the statute of limitations may have been tolled through the arbitration which concluded on May 30, 1997. However, the statute of limitations should not be tolled in this case for the reasons that follow.

As previously stated, section 4.4.2 of the CBA states:

> No Unit Member shall be in any way discriminated against, intimidated, restrained or coerced because of affiliation with or participation in the Association, or the exercise of rights guaranteed by Chapter 10.7, sections 3540-3549 of the Government Code.

Kiszely's grievance indicates the District violated sections 24.2.3; 24.7; 4.6; 24.3.4.3; 4.6.2; 4.7.3.2; and 4.4.1 of the CBA. The arbitration award indicates Kiszely's October 8, 1996 grievance alleged the Notice of Unprofessional violated the following sections of the CBA: 4.4.1; 4.6; 4.6.2; 4.7.3.2; and 24.3.4.3. Based on this information it does not appear that the October 8, 1996, grievance alleged the District violated section 4.4.2. Accordingly it would be inappropriate to toll this unfair practice charge because the District was not on notice that the Charging Party was alleging the District discriminated against her for her participation in activities protected under the EERA. Thus, the filing of that grievance did not toll the statute of limitations period. Without tolling, the statute of limitations period for allegations (f), (g), and (h) expired in July 1996, September 1996, and January 3, 1997, respectively. Since this charge was not filed until September 2, 1997, the charge is untimely and outside the jurisdiction of PERB.

Even if the October 8, 1996, grievance tolled the statute of limitations period, allegations (f), (g), and (h) are still untimely filed. As previously stated, allegations (f), (g), and (h) occurred in January 1996, March 1996, and July 3, 1996, respectively. Subtracting the number of months the grievance was being processed from the total amount of time elapsed since the alleged violations, it appears more than six months remain. Thus, the allegations are untimely filed and outside the jurisdiction of PERB.

Even if the charge is timely filed, the charge as presently written does not state a prima facie violation of the EERA.

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees <u>because of</u> the exercise of those rights. <u>(Novato Unified School District</u> (1982) PERB Decision No. 210; <u>Carlsbad Unified School</u>

District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.) As presently written, this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of EERA section 3543.5(a).

As stated in the November 21, 1996, Warning Letter in Unfair Practice Charge No. LA-CE-3699, which first addressed these allegations, the January 1996, letter of complaint signed by faculty members does not demonstrate conduct attributable to the District. The letter, on its face, indicates it was signed by full-time tenured faculty. The charge does not bear any endorsement by an agent of the District. The Charging Party indicated in our discussions, prior to the filing of a Notice of Appearance form by her attorney, that one of the signatories lives with Dean Janet Portolan. Despite that fact, the charge does not demonstrate Dean Janet Portolan or any other agent of the District is responsible for the January 1996, letter of complaint. Thus, this allegation does not state a prima facie violation.

Nor does the charge demonstrate the requisite nexus for any of the alleged acts of discrimination. My telephone call on January 15, 1998, to John R. Marshall requesting more information regarding nexus was not returned.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The

amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 18. 1998. I shall dismiss your charge. If you have any questions, please call me at (213) 736-3127.

Sincerely,

Tammy L. Samsel
Regional Director